83-1309

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Does the attorney-client privilege protect from disclosure by the attorney confidential communications between the attorney and his client, where it has not been determined, in accordance with *Fisher* v. *United States*, 425 U.S. 391, 402-405, whether the client could constitutionally be compelled to reveal the same information?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 722 F.2d 303 and is reproduced at pp. 1a-12a, *infra*. The opinion of the District Court, reproduced at pp. 15a-25a, *infra*, is not officially reported.

JURISDICTION

The judgment of the Court of Appeals (pp. 13a-14a, *infra*) was issued on December 5, 1983.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] On January 11, 1984 the Court of Appeals granted a 30-day stay of that court's mandate to permit the filing of this Petition.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

Federal Rule Evid. 501 provides, "Except as otherwise required by the Constitution of the United States . . . the privilege of a witness [or] person shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

STATEMENT OF THE CASE

This case arises from a subpoena *ad testificandum* issued by a special grand jury convened by the United States District Court for the Northern District of Ohio, which was investigating alleged violations of the Internal Revenue Code by Reuben Sturman and corporations believed by the government to be under his control. On May 2, 1980, the grand jury subpoenaed Larry S. Gordon, a Cleveland attorney, to appear before the grand jury. Gordon appeared and testified, in the course of which testimony he stated that he had incorporated twelve corporations, that the corporate records and stock ledgers for these corporations were kept at his firm's offices, and that Sturman was a client of the firm's and was represented by Gordon. P. 2a, *infra*.

Gordon refused to answer nine questions which were characterized but not set forth in full text in the opinion below. The questions were the following:

1. Who requested that that corporation be incorporated? (Tr. 32)

2. At whose request was the corporation incorporated? (Tr. 41)

3. Who removed [the corporate minute book and the records of ownership and officers for that corporation]? (Tr. 32-33)

4. By whom [were the corporate minute books and ownership records removed]? (Tr. 34)

5. Is it your intention to assert the attorney-client privilege in response to questions as to the six corporations concerning who provided the shareholder and officer information to the members and employees of your law firm? (Tr. 43)

6. With respect to the additional six corporations I have just named, who requested you or your law firm to incorporate those corporations? (Tr. 44)

7. As to all of the corporations that I have questioned you about so far, was the request for incorporation made in any case by either an officer or shareholder of the respective corporations? (Tr. 44)

8. Can you identify for us who the agent was for each of those corporations with whom the law firm dealt? (Tr. 47)

9. Could you tell us if by agent of the corporation you are referring to 12 different individuals or to one individual who was an agent for all 12 corporations? (Tr. 47)

Gordon refused to answer the nine questions, asserting the attorney-client privilege, and stating that the privilege had not been waived by the client. On January 22, 1982, the government filed a motion for an order compelling Gordon to answer these questions, which it had synthesized into four categories, in support of which it filed an *in camera* affidavit stating, *inter alia*, that the grand jury was investigating alleged tax offenses by Reuben Sturman and the corporations identified in Gordon's testimony, that Gordon was one of the attorneys for Sturman, and that repeated but unsuccessful attempts were made to secure information from other sources

about the ownership of the twelve corporations. Pp. 1a-2a, *infra*. A client of Gordon's, using the pseudonym "John Doe," moved to intervene to oppose the government's motion to compel. Doe's supporting affidavit stated, *inter alia*, that he was the client who directed Gordon to incorporate the companies at isuse and was the individual whom the government was attemptng to identify through Gordon's interrogation. Pp. 3a, 8a, *infra*. Doe represented that although he was innocent of any wrongdoing, disclosure of the information by his attorney would be incriminating and would probably result in his indictment.

On March 15, 1983, the District Court granted Doe's motion to intervene for the purpose of asserting the attorney-client privilege, but ruled that Doe's reliance on the Fifth Amendment privilege against compelled self-incrimination was "misplaced." P. 3a, *infra*. On March 29, 1983, the District Court granted the government's motion to compel in full, concluding that compelling Gordon to answer the questions over his client's objection would not constitute an invasion of the attorney-client privilege. Doe appealed from the order, execution of which was stayed by the District Court pending appeal.

The Court of Appeals affirmed.[2] The court, in an opinion by Judge Krupansky, relied on the "unanimously embraced . . . general rule that the identity of the client is . . . not within the protective ambit of the attorney-client privilege," quoting a decision written by the same judge, and issued on December 7, 1983, two days after the court's decision herein. That decision, *In re Grand Jury Investigation No. 83-2-35* (*Durant*), No. 83-1290 (CA 6, decided December 7, 1983) (hereafter "*Durant*"), is reproduced at pp. 26a-40a, *infra*. The court characterized the unanswered questions as involving the identity of the client and ruled that no exception to the "general rule" protected Doe from disclosure by Gordon.

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[2] The court held that the District Court order was appealable, pp. 4a-7a, *infra*.

REASONS FOR GRANTING THE WRIT

This case presents a serious and recurring question concerning the scope of the attorney-client privilege in the federal courts. Here, as with increasing frequency, the United States has subpoenaed an attorney to appear before a grand jury in order to compel testimony which may implicate his client in criminal conduct which the grand jury is investigating. The court below has overridden his client's claim of privilege on the theory that the questions which the attorney declined to answer sought only the "identity" of the client, that such questions are as a rule outside the privilege, and that generally recognized exceptions to that rule are either unsound or inapplicable.

As we will show, the Court of Appeals' approach is fundamentally inconsistent with the purpose of the privilege. That court failed to inquire whether compulsion of the attorney's testimony would undermine the purpose of the privilege "to encourage full and frank communication between attorneys and their clients", *Upjohn Co.* v. *United States*, 449 U.S. 383, 389, and more specifically, as in *Fisher* v. *United States*, 425 U.S. 391, 402-405, whether the information which was sought to be obtained from the attorney could be compelled from the client. We shall show further that even on the Court of Appeals' assumption that the availability of the privilege should be determined by a mechanical application of an "identity" exclusion, the decision below should be reviewed because it expressly rejected a pertinent exception recognized by other courts of appeals. Finally, review is essential, because, "if the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected" (*Upjohn*, 449 U.S. at 393). The present uncertainty creates a serious dilemma for attorneys, especially under the new Model Rules of Professional Conduct, which require attorneys to preserve the confidentiality of client communications in the absence of a final judicial order directing a re-

sponse; it inevitably delays grand jury proceedings while the attorney-witness litigates whether he or she is required (and indeed ethically permitted) to answer.

I. The Decision Below Is Inconsistent With This Court's Decisions Declaring the Purpose of the Attorney-Client Privilege, and Specifying the Analysis Which the Courts Should Employ in Determining the Scope of That Privilege.

This Court has consistently reaffirmed the historic importance of the attorney-client privilege in our legal system.[3] In *Upjohn Co.* v. *United States*, 449 U.S. 383, the Court stated that the purpose of the privilege:

> is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. [449 U.S. at 389]

So too, in *Fisher* v. *United States*, 425 U.S. 391, the Court said:

> The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. * * * As a practical matter, if the client knows that damaging information could be more readily obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. [425 U.S. at 403] [4]

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[3] Leading nineteenth-century cases in this Court endorsing the privilege are *Chirac* v. *Reinicker*, 11 Wheat. (24 U.S.) 280 (Story, J.), and *Hunt* v. *Blackburn*, 128 U.S. 464.

[4] The reasoning of *Fisher* was anticipated in the seminal case of *Annesley* v. *Earl of Anglesea*, 17 How.St.Tr. 1139, 1225 (Ex. 1743), *as quoted in* 8 Wigmore, *Evidence*, § 2291, at 545 (McNaughton rev. 1961):

> The reason why attorneys are not to be examined to anything relating to their clients or their affairs is because they would

Disregarding these precedents, the court below rejected Doe's claim of privilege without considering whether compelling Gordon to answer would undermine the purpose of the privilege by requiring Gordon to reveal information which Doe could not be compelled to disclose. This was the inquiry which this Court undertook in *Fisher*, 425 U.S. at 405-414. The court below pretermitted that inquiry by determining simply that the questions directed to Gordon fell within an "identity" exclusion from the privilege:

> it is evident that the four interrogatories directed to Gordon merely seek the identity of his client. This Circuit has acknowledged the "unanimously embraced . . . general rule that the identity of a client is . . . not within the protective ambit of the attorney-client privilege." [P. 7a, *infra*, citing *In re Grand Jury Investigation No. 83-2-35*, No. 83-1290 (*Durant*), (CA 6, decided Dec. 7, 1983).]

The court cited *Fisher* only in a different context and did not mention *Upjohn* at all.

The "general rule" thus relied on is rooted in the concerns of *civil* litigation:

> The identity of the attorney's client * * * will seldom be a matter communicated in confidence because the procedure of litigation ordinarily presupposes a disclosure of these facts. Furthermore, so far as a client may in fact desire secrecy and may be able to secure action without appearing as a party to the proceedings, it would be improper to sanction such a wish. Every litigant is in justice entitled to

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destroy the confidence that is necessary to be preserved between them. This confidence between the employer and the person employed, is so sacred a thing, that if they were at liberty, when the present cause was over that they were employed in, to give testimony in favour of any other person, it would not answer the end for which it was instituted. The end is, that persons with safety may substitute others in their room; *and therefore if you cannot ask me, you cannot ask that man; for everything said to him, is as if I had said it to myself, and he is not to answer it.* (Emphasis added.)

know the identity of his opponents. [8 Wigmore, *Evidence* § 2313, at 609 (McNaughton rev. 1961).]

The rule has been extended to criminal law proceedings in many lower court decisions in which the answers sought were strictly limited to the identity of the client or the fee arrangement between the attorney and the client. See the cases cited in *Durant* at p. 33a, *infra*.

While the identity "rule" may have validity in certain narrow contexts, it is clear that when questions posed before the grand jury go beyond the narrow inquiry—"Who is your client?" or "What is your fee arrangement?"—the rejection of a claim of privilege frustrates the very purpose of the privilege. *This use of the identity "rule" turns it into a tool to undermine the privilege and compel the disclosure of information from the attorney that could not be compelled from the client; it subverts the privilege by creating a powerful disincentive for any client to make full disclosure to his or her attorney while seeking legal advice.*

This danger is especially acute in situations like that here. It is apparent from the record that the disclosure sanctioned by the Sixth Circuit has effectively compelled Gordon to become an incriminating witness against his own client. According to the government, the investigation was focused on the "financial affairs of Reuben Sturman and various corporations believed to be owned and/or controlled by him"; Gordon was one of the attorneys for Sturman; the focus of the investigation was "possible understatements of individual income by Sturman and abuse of the corporate surtax exemption . . . by a large group of corporations believed to be under [Sturman's] ownership and control";[5] and certain grand jury witnesses had testified that Sturman was the individual with whom they dealt when records of some of the corporations were required. See p. 22a, *infra*. For his part, Doe

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[5] Memorandum in Support of the Motion of the United States of America for an Order Compelling Larry S. Gordon to Testify Before the Grand Jury, Jan. 26, 1982.

stated in his affidavit that he "was the individual the government was attempting to identify through Gordon's interrogation."[6] The District Court held that Doe had "established by affidavit that he is the client referred to in at least three of the . . . questions."[7] Gordon has accordingly been asked to *explicitly* link his client with the allegedly fraudulent corporations investigated by the grand jury. Gordon was *not* asked the "identity" of his client, as the Sixth Circuit opinion suggests, but rather was asked nine questions, *see* pp. 2-3, *supra*, whose clear purpose was to evoke responses that would *incriminate* his client, not "merely seek the identity of his client," p. 7a, *infra*. Gordon's refusal to answer the questions, as comprising privileged communications, recognized that the entire line of questioning was nothing more than an attempt to elicit incriminating information from him that could not be compelled from his client.

II. The Decision Below Conflicts With the Decisions of Other Courts of Appeals.

Even on the Court of Appeals' premise that this case should be decided on the basis of a general rule, which excludes questions of client identity from the attorney-client privilege, the decision below should be reviewed because it concededly conflicts with the decisions of other courts of appeals. Those courts, recognizing the grave incriminating potential of "identity" questions, have adopted an exception to the "general rule" whereby the attorney-client privilege will be honored "when disclosure of the identity of the client would provide the 'last link' of evidence." (*Durant*, p. 87a, *infra*). This "last link" exception is well established in the Fifth Circuit. As that court said in *In re Grand Jury Proceedings* (*Pavlick*), 680 F.2d 1026 (CA 5, 1982) (*en banc*):

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[6] Affidavit for Ex Parte, In Camera Use of the Court, Filed in Support of Motion of John Doe for Leave to Intervene, filed February 11, 1982, referred to at p. 3a, *infra*.

[7] P. 10a, *infra*.

> We have long recognized the general rule that matters involving the payment of fees and the identity of clients are not generally privileged. *In re Grand Jury Proceedings*, (*United States* v. *Jones*), 517 F.2d 666 (5th Cir. 1975); *see* cases collected *id.* at 670 n.2. There we also recognized, however, a limited and narrow exception to the general rule, one that obtains when the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment. [680 F.2d at 1027]

The Eleventh Circuit has also adopted the "last link" exception as pronounced in *Pavlick*. *In re Grand Jury Proceedings* (*Twist*), 689 F.2d 1351, 1352 (CA 11, 1982).

However, in *Durant*, the Sixth Circuit expressly disapproved these decisions and the "last link" exception, stating that it

> is simply not grounded upon the preservation of confidential *communications* and hence not justifiable to support the attorney-client privilege. Although the last link exception may promote concepts of fundamental fairness against self-incrimination, these concepts are not proper considerations to invoke the attorney-client privilege. Rather, the focus of the inquiry is whether disclosure of the identity would adversely implicate the confidentiality of communications. Accordingly, this Court rejects the last link exception as articulated in *Pavlick*. [P. 38a, *infra*, emphasis in original]

This holding of *Durant* was incorporated by reference in the Sixth Circuit's opinion in this case: the court entertained only those exceptions to the identity exclusion from the privilege which had been approved in *Durant*. *See* p. 7a, *infra*.

In light of *Fisher* the Court of Appeals plainly erred in asserting that the "concepts of fundamental fairness against self-incrimination" could not be considered in applying the attorney-client privilege. In *Fisher* the issue was whether the attorney-client privilege shields docu-

ments which the client had given to the attorney for the purpose of seeking legal advice. This Court held that the answer depends on whether the *client* could be required to produce them, quoting approvingly the statement in Wigmore's treatise:

> "It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce." 8 Wigmore § 2307, p. 592 [425 U.S. at 404 (this Court's emphasis)]

Since the attorney-client privilege, and thus the rationale of *Fisher*, is not limited to documents, but extends to all confidential communications, the Court of Appeals should have determined at the least whether answering any or all of the questions would have provided the "last link." This is not to say that the "last link" exception to the "identity" limitation provides adequate protection to the attorney-client privilege. Rather, the attorney's refusal to answer should be privileged unless it is "'*perfectly clear*, from a careful consideration of all the circumstances in the case, that * * * the answer[s] *cannot possibly* have such tendency' to incriminate" his client. *Hoffman* v. *United States*, 341 U.S. 479, 488, *quoting Temple* v. *Commonwealth*, 75 Va. 892, 898 (1880) (emphasis added in *Hoffman*). Only this standard is consistent with *Fisher*'s holding that the attorney-client privilege shields against compelled disclosure *by the attorney* of information which, under the Fifth Amendment, may not be coerced *from the client*.

III. The Question Is of Major Significance to the Legal Profession and the Administration of Justice.

There is another important reason for this Court to establish a principled analysis for attorney-client privilege issues in the grand jury setting. The regime of professional standards to which lawyers are held accountable

has undergone significant changes which create serious hazards for attorneys from whom information relating to their clients is sought to be compelled.

DR 4-101(A) formerly provided that information "*gained in* the professional relationship" was subject to the attorney-client privilege. The new Model Rules of Professional Conduct adopted by the American Bar Association's House of Delegates on August 2, 1983, broaden this definition to provide that the privilege applies to information "*relating* to representation of a client . . . ."[8] The commentary to the Model Rules reflects that the change was designed to be more protective of the privilege, as it applies "not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[9] Moreover, the former Disciplinary Rules provided that a lawyer was obligated to preserve client confidences subject to an exception that permitted, *inter alia*, the revelation of such confidences "when required by law or court order." DR 4-101(C)(3). The Model Rules of Professional Conduct do not incorporate this provision. Model Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

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[8] Rule 1.6(a), American Bar Association's Model Rules of Professional Conduct, *reprinted in* 52 U.S.L.W. 1, 5 (Aug. 16, 1983) (emphasis added). The Model Rule thus "imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or require a lawyer to speculate whether particular information might be embarrassing or detrimental." ABA/BNA *Lawyer's Manual on Professional Conduct* (1984) at 55:303.

[9] 52 U.S.L.W. at 6.

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[10]

The only reference to the principle of the former Disciplinary Rule is in the commentary to the Model Rules which states in pertinent part:

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.[11]

The commentary does not materially circumscribe the obligation stated in the Model Rules. It merely makes clear that attorneys are not ethically required to disobey the direction of *Maness* v. *Meyers*, 419 U.S. 449, 458-459. The new Rules require attorneys from whom disclosure is sought to press their client's privilege claims through the courts of appeals, if not to review by certiorari.

Thus, the writ should also issue to furnish needed guidance to the legal profession in light of the Model

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[10] 52 U.S.L.W. at 5.

[11] *Id.* at 7.

Rules, for as this Court has recognized, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 393. Finally, the efficient administration of justice requires that the scope of the attorney-client privilege in the grand jury setting be authoritatively and promptly determined. As long as there is—at the very least—a substantial question whether restrictions imposed on the privilege by the lower courts are consistent with the principles established by this Court, grand jury proceedings will inevitably be delayed while the attorney-witness seeks appellate instruction, as he or she is duty-bound to do.

CONCLUSION

For the above-stated reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83-3243

IN RE: GRAND JURY PROCEEDINGS—LARRY GORDON,

JOHN DOE,
Intervenor-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio

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Decided and Filed December 5, 1983

Before: EDWARDS, and KRUPANSKY, Circuit Judges; and REED, District Judge *.

KRUPANSKY, Circuit Judge. The intervenor-appellant, John Doe (Doe), appeals from an order of the District Court for the Northern District of Ohio which requires Larry S. Gordon (Gordon) to answer certain questions posed by a federal grand jury.

The factual background to this controversy is straightforward. For several years a grand jury sitting in the

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* Hon. Scott Reed, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Northern District of Ohio has been conducting an investigation into possible violations of the Internal Revenue Code by Reuben Sturman (Sturman) and several alleged corporate facades under his control.

Despite continuous efforts, the grand jury has been frustrated in its attempts to secure documented information concerning the stock ownership and/or control of the corporations which are the subject of the grand jury investigation. On May 2, 1980, the grand jury issued a subpoena *ad testificandum* to Larry S. Gordon (Gordon), an attorney with the law firm of Berkman, Gordon, Kancelbaum & Levy. Gordon appeared on the scheduled date and testified. He identified 12 corporations incorporated by his law firm and also four others as clients of the firm. Gordon further testified that, at some period of time, the corporate record books and stock ledgers for these corporations were kept at his firm's offices. Finally, Gordon acknowledged that Sturman was a client of the firm who was represented by Gordon.

However, when confronted by certain inquiries designed to elicit information concerning the alleged *de jure* corporate status of the corporations here in issue, Gordon refused to answer, invoking the attorney-client privilege. Accordingly, on January 22, 1982, the government petitioned the district court to compel Gordon to:

1. identify the person or persons who requested each incorporation;

2. identify the person or persons who provided the law firm with information concerning the identity of the officers and shareholders of each corporation; and

3. identify the agent or representative the firm dealt with when legal matters arose concerning each of the named corporations;

4. identify the person or persons who requested and/or received custody of the records of each corporation from the law firm in January, 1978.

The government submitted an affidavit under seal in support of its motion.

Thereafter, Gordon requested that he be permitted to examine his grand jury testimony and the affidavit in support of the aforementioned motion that had been submitted by the government under seal. A motion to intervene was also filed by a "John Doe" asserting that he was the individual the government was attempting to identify through Gordon's interrogation.

On January 18, 1983 the lower court granted Gordon's request to examine his grand jury testimony but denied him access to the affidavit filed by the government in support of its motion to compel answers to the grand jury. The court deferred ruling on Doe's motion to intervene to enable Doe to demonstrate to the court that he was in fact Gordon's client and the target of the inquiries. On March 15, 1983, after reviewing, *in camera*, an affidavit from Doe, the lower court permitted him to intervene "on the basis of John Doe's claim of attorney-client privilege." Doe had also asserted a right to intervene based on the Fifth Amendment, but the lower court found the reliance "misplaced."

On March 29, 1983, the lower court granted the government's motion to compel Gordon to answer the four identity questions directed to him concluding that the answers would not constitute an invasion of the attorney-client privilege.

The intervenor appealed from this order, execution of which has been stayed by the lower court.

Initially, this Court is confronted with a jurisdictional issue.[1] Generally, an order compelling testimony or denying a motion to quash a grand jury subpoena is not appealable. *United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940). A party seeking to contest the validity of the trial court's order must refuse compliance, thereby inviting a contempt citation which, when imposed, becomes an appealable order.

The Supreme Court has recognized an exception to this rule when the party seeking review has a more direct interest in preventing disclosure of the information sought by the grand jury than the individual to whom the subpoena was directed. *Perlman* v. *United States*, 247 U.S. 7 (1918). The rationale for the exception recognizes that the subpoenaed party, to avoid a contempt citation, may voluntarily comply with the subpoena thereby depriving the real party in interest of a protected right and appellate review.

Presently there is a conflict within the Circuits as to the application of the *Perlman* exception, where, as here, a client seeks immediate review of an order compelling testimony or documents from his attorney. The majority view recognizes the exception and permits immediate appellate review. *See United States* v. *Jones*, 696 F.2d 1069 (4th Cir. 1981); *In re Grand Jury Subpoena Duces Tecum* (*Marger/Merenbach*), 695 F.2d 363 (9th Cir. 1982); *In re Grand Jury Proceedings* (*Damore*), 689 F.2d 1351 (11th Cir. 1982); *In re Grand Jury Proceedings* (*Fine*), 641 F.2d 199 (5th Cir. 1981); *In re Grand Jury Proceedings* (*Malone*), 655 F.2d 882 (8th Cir. 1981); *In re Katz*, 623 F.2d 122 (2d Cir. 1980), *In re Grand Jury Proceedings* (*FMC Corp.*), 604 F.2d 798 (3d Cir.

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[1] Although the government does not contest this Court's jurisdiction, the Court has the obligation to consider the issue, sua sponte. *See, e.g., Columbia Coated Fabrics* v. *Industrial Commission of Ohio*, 498 F.2d 408 (6th Cir. 1974).

1979); *Velsicol Chemical Corp.* v. *Parsons*, 561 F.2d 671 (7th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978). The D.C. and First Circuits have decided that the order is not immediately appealable. *In re Sealed Case*, 655 F.2d 1298 (D.C. Cir. 1981); *In re Oberkoetter*, 612 F.2d 15 (1st Cir. 1980).

In concluding that the order is not immediately appealable, the First Circuit stated that a "stout-hearted" attorney may risk a contempt citation in his client's interest. This premise is tenuous. As noted by the Fifth Circuit:

> We suspect that the willingness of a lawyer to protect a client's privilege in the face of a contempt citation will vary greatly, and have a direct relationship to the value of the client's business and the power of the client in relation to the attorney. We are reluctant to pin the appealability of a district court order upon such precarious considerations.
>
> * * * *
>
> Although we cannot say that attorneys in general are more or less likely to submit to a contempt citation rather than violate a client's confidence, we can say without reservation that some significant number of client-intervenors might find themselves denied all meaningful appeal by attorneys unwilling to make such a sacrifice. That serious consequence is enough to justify a holding that a client-intervenor may appeal an order compelling testimony from the client's attorney.

In re Grand Jury Proceedings (Fine), *supra*, at 202-03 (footnote omitted).[2]

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[2] The American Bar Association's former Disciplinary Rules permitted a lawyer to disclose a client's confidences when "required by law or court order." DR 4-101 (c)(2). *See generally In re Grand Jury Proceedings (Fine)*, *supra* at 202-03. The recently adopted Model Rules of Professional Conduct do not expressly address the

This Court adopts the above-quoted logic and joins the majority of other Circuits in applying the *Perlman* exception in those cases wherein a client seeks immediate appeal of an order compelling testimony from his attorney.

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attorney's responsibility to maintain confidentiality in the face of a court order. Rule 1.6 provides as follows:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> >
> > (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

On its' face, the Rule does not afford the attorney the option of disclosing information when compelled by court order. However, the Comment accompanying Rule 1.6 states, in pertinent part:

> The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

(emphasis added). The Comment appears to indicate that an attorney cannot place himself in contempt but must disclose confidences when so ordered by a court.

In any event, this Court does not believe that appealability should hinge on an attorney's interpretation of the Disciplinary Rules, the Model Rules of Professional Conduct (whichever is applicable) or the attorney's "stout-heartedness."

Accordingly, the Court's appellate jurisdiction is properly invoked in the matter at bar.[2]

Addressing the merits of the instant case, it is evident that the four interrogatories directed to Gordon merely seek the identity of his client. This Circuit has acknowledged the "unanimously embraced . . . general rule that the identity of a client is . . . not within the protective ambit of the attorney-client privilege." *In re Grand Jury Investigation No. 83-2-35*, No. 83-1290, slip op. at —— (6th Cir. —— ——, 1983).

This Court, in *In re Grand Jury Investigation No. 83-2-35*, *supra*, has also recognized two exceptions to the general rule. The first exception, characterized as the "legal advice" exception, was defined by the Ninth Circuit in *In re Grand Jury Subpoena Duces Tecum (Marger/Merenbach)*, *supra* at 365:

> A significant exception to this principle of nonconfidentiality holds that [the identity] may be privileged when the person invoking the privilege is able to show that a strong possibility exists that disclosure of [his identity] would implicate the client in the very matter for which legal advice was sought in the first case.

In the case at bar, the district court concluded that the "legal advice" exception was inapplicable to this case.

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[2] In *In re Buckley*, 356 F.2d 385 (6th Cir. 1966), an attorney refused to answer three questions directed to him before a grand jury, invoking the attorney-client privilege. The district court instructed the attorney to respond. The corporation for which the attorney was house counsel attempted to appeal from the lower court's order. This Court concluded that, inasmuch as the witness had not been cited for contempt, the order was not appealable.

The Court in *Buckley* did not consider the possible applicability of the *Perlman* exception. Moreover, in *In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d 933, 935, n.2 (6th Cir. 1980), this Court indicated that the exception does apply in a attorney-client relationship. This panel therefore does not consider *Buckley* dispositive on the issue.

This Court concurs. The record, including the *in camera* affidavit of Doe, discloses that Doe sought legal assistance to incorporate several companies. There is no criminal implication arising from Doe having directed an attorney to incorporate a number of business enterprises. Accordingly, the legal advice exception is unavailing to Doe.

The second exception recognized in *In re Grand Jury Investigation No. 83-2-35*, is applicable "where disclosure of the identity would be tantamount to revealing an otherwise confidential communication." *In re Grand Jury Investigation No. 83-2-35*, *supra* at ——. As pronounced by the Fourth Circuit:

> The privilege may be recognized where so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.

NLRB v. *Harvey*, 349 F.2d 900, 905 (4th Cir. 1965).

In considering the applicability of the second exception, the Court addresses each of the four inquiries directed to Gordon. Inquiry #1 seeks the identity of the individual who engaged Gordon to incorporate each company. Gordon's previous disclosures simply reveal that a client employed his firm to incorporate the companies. Doe, in his *in camera* affidavit, conceded that he is the client who directed Gordon to incorporate the companies in issue. Accordingly, the identity of the client, within the context of the developed facts, merely amounts to a disclosure of the scope and objective of the legal employment undertaken by Gordon.

The mere "fact of consultation including the component facts of . . . scope or object of employment" is not privileged. McCormick, Evidence § 90 (2d ed. 1972). *See also* 2 Weinstein's Evidence ¶ 503(a)(4)[01] (1982); *Colton* v. *United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963) (general nature of legal serv-

ices performed not privileged).[4] Thus disclosure of Doe's identity in response to inquiry #1 would not be tantamount to disclosure of a confidential communication.

Inquiry #2 seeks to have Gordon disclose the name of the individual who conveyed to Gordon the identity of the officers and shareholders of the various corporations. The names of shareholders and officers "are clearly a matter of corporate record [and] are not normally the kind of confidential information which is subject to the attorney-client privilege." *United States* v. *Mackey*, *supra* at 859. Inasmuch as the substance of the communication was not confidential, revelation of the identity of the individual who supplied the names of the corporate officers to Gordon cannot amount to disclosure of a confidential communication. Therefore, question #2 does not seek privileged information and should be answered.

Inquiry #3 seeks the identity of the representatives of the corporations with whom the law firm communicated regarding "legal matters" involving the corporations. The inquiry does not seek, nor has there been any disclosure of, communications between Gordon and corporate representatives concerning substantive corporate legal issues. Accordingly, the second exception enunciated in *In re Grand Jury Investigation No. 83-2-35*, is totally inapplicable to inquiry #3 and Gordon has no basis for refusing to respond.

The fourth and final question does not relate to communications which in any manner concern legal advice or legal representation. The question merely attempts to de-

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[4] In *United States* v. *Mackey*, 405 F.Supp. 854 (E.D. N.Y. 1975), defendants sought dismissal of indictments on the basis that the testimony of their attorneys before the grand jury violated the attorney-client privilege. The testimony concerned incorporation of certain business entities. Judge Weinstein held that such facts "simply relating that certain corporate documents were drawn at the behest of [the client] are not privileged from disclosure before the grand jury." *Id.* at 859.

termine the identity of the individual to whom the law firm delivered the corporate records. Indeed, as the lower court noted, Doe has not indicated that the fourth question refers to him. Accordingly, there is no basis for applying the attorney-client privilege to inquiry #4.

In sum, the Court concludes that response to the four inquiries posed by the grand jury will not infringe on the attorney-client privilege and the district court's order compelling Gordon to respond to these inquiries was proper.

Appellant next asserts that his attorney should have been permitted to assert the Fifth Amendment privilege against self-incrimination on behalf of his client. However, existing legal precedent in this Circuit holds that the Fifth Amendment privilege is a personal privilege and "does not permit an attorney to plead that his client might be incriminated by his testimony." *United States* v. *Haddad*, 527 F.2d 537, 539 (6th Cir. 1975). *Accord*: *United States* v. *Goldfarb*, 328 F.2d 280 (6th Cir. 1964).[3]

Finally, appellant asserts that he was denied due process by the district court's refusal to grant him access to the sealed affidavit filed by the government in support of its motion to compel. The government had initially submitted the affidavit to establish that Gordon's legal services had been retained in furtherance of ongoing criminal activity thereby precluding use of the attorney-client priv-

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[3] Doe's reliance on *Fisher* v. *United States*, 425 U.S. 341 (1976), is misplaced. In *Fisher*, the Supreme Court held that when a client's papers are delivered to an attorney in pursuit of legal advice, those papers are protected by the *attorney-client* privilege if the Fifth Amendment would have protected them in the hands of the client. This holding is based on the attorney-client privilege, *see*, *Matter of Grand Jury Empanelled February 14, 1978*, *supra* at 475, and this Court has previously found that privilege inapplicable to the facts of this case. The Supreme Court in *Fisher* expressly declined to decide "whether an attorney may claim the Fifth Amendment privilege of his client." *Id.* at 402 n. 8. Accordingly, we adhere to our previous decisions and reject appellant's Fifth Amendment argument.

ilege to shield disclosure of communications. The lower court rejected this argument and the government has not pressed it on appeal.

The district court reviewed the affidavit *in camera* and, finding that it consisted primarily of evidence generated by the grand jury, including the testimony of other witnesses, denied Gordon and Doe access to the affidavit. The Seventh Circuit addressed this precise issue in *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980). In that case the government also submitted material under seal to establish that fraud vitiated the attorney-client privilege claimed by the recipients of a grand jury subpoena *duces tecum*. The trial court reviewed the documents *in camera* and, on appeal, the subpoenaed parties asserted that their rights to due process had been violated. The Seventh Circuit rejected the contention:

> The *in camera* submissions were themselves generated by the Grand Jury's investigation and were necessary to support its claim that the subpoenaed documents should be made available.
>
> • • • •
>
> Those documents contain the words of grand jury witnesses, the disclosure of which could affect the continued cooperation of those witnesses and chill or distort the future testimony of others. In these circumstances, the judge's decision to view the documents *in camera* did not constitute a due process violation or an abuse of his discretion.

Id. at 57-58 (footnote omitted).

Similarly, in *In re John Doe Corp*, 675 F.2d 482, 490 (1982), the Second Circuit upheld the use of *in camera* submissions to resolve the government's claims that an attorney-client relationship was tainted by a criminal purpose:

We recognize that appellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case. The alternatives, however, are sacrificing the secrecy of the grand jury or leaving the issue unresolved at this critical juncture. We believe those alternatives less desirable than the *in camera* submission utilized by Judge Sifton. Appellant, after all, is itself asserting a right to confidentiality, and the government wanted to test the validity of that claim. Appellant's argument that the government may not do so without sacrificing its own valid claim to secrecy seems rather ironic in the circumstances. Leaving the issue unresolved, on the other hand, would permit wholly untested claims of privilege to obstruct investigations of federal crimes. There is a public interest in respecting confidentiality of communications by clients to their attorneys, in maintaining the secrecy of grand jury proceedings and in investigating and prosecuting federal crimes. Where these interests conflict or the validity of privilege claims based on these interests are challenged, the limitations on adversary argument caused by *in camera* submissions are clearly outweighed by the benefits of obtaining a judicial resolution of a preliminary evidentiary issue while preserving confidentiality.

Accord, In Re Grand Jury Proceedings (Fine), 708 F.2d 1571, 1576 (11th Cir. 1983). This Court is persuaded that an *in camera* submission on the facts of this case was a reasonable accomodation of the need to maintain secrecy of the grand jury investigation and the need for prompt resolution of the privilege issue. Hence, this Court finds no abuse of discretion and no deprivation of appellant's right to due process.

Accordingly, the lower court's order compelling Gordon to respond to the enumerated grand jury inquiries is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83-3243

IN RE: GRAND JURY PROCEEDINGS—LARRY GORDON.

JOHN DOE,
Intervenor-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before: EDWARDS and KRUPANSKY, *Circuit Judges*; and REED, *District Judge.*

[Filed December 5, 1983]

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER
OF THE COURT
JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk

A True Copy.
Attest:

Deputy Clerk

Issued as Mandate:

COSTS:

Filing fee .....$
Printing .....$

Total .....$

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE GRAND JURY PROCEEDINGS

(MATTER OF LARRY S. GORDON)

[Filed March 29, 1983]

MEMORANDUM OPINION
AND ORDER

Battisti, C.J.

I.

A special federal grand jury is currently conducting an investigation into possible violations of the Internal Revenue Code, 26 U.S.C. §§ 7201, 7206(2) (1976). In particular, the inquiry has focused upon the financial affairs of Reuben Sturman and a large number of corporations alleged to be under his ownership and control.

In an attempt to secure information concerning the ownership of these corporations, the grand jury issued a subpoena to Larry S. Gordon, an attorney who has represented Sturman. Gordon appeared on May 19, 1980 in response to the subpoena. He identified twelve corporations as having been incorporated by his law firm and as having been clients of the firm. He identified two others as being clients of the firm. He also testified that Mr. Sturman was a client of his law firm. Further, he testified that the firm had kept the records of the corporations at one time, but they had been removed in January, 1978. However, when asked to identify the person or persons with whom the law firm dealt on matters con-

cerning these corporations or their records, Mr. Gordon refused to answer on the basis of the attorney-client privilege.

The government has filed a motion to compel Mr. Gordon to:

a. identify the person or persons who requested each incorporation;

b. identify the person or persons who provided the law firm with information concerning the identity of the officers and shareholders of each corporation; and

c. identify the agent or representative the firm dealt with when legal matters arose concerning each of the named corporations.

d. identify the person or persons who requested and/or received custody of the records of each corporation from the law firm in January, 1978;

The government contends that the identity of the individual or individuals in question is not covered by the attorney-client privilege, but even if it were, the privilege is nevertheless defeated by the crime or fraud exception. In support of its motion, the government has submitted two affidavits purporting to constitute the government's *prima facie* showing that legal advice was sought from Gordon's firm for the intended purpose of setting up a fraudulent tax evasion scheme.

Recently, the Court granted the motion of one John Doe to intervene in this matter. John Doe has established by affidavit that he is the client referred to in at least three of the above questions. The Court permitted intervention on the basis of John Doe's interest in the non-disclosure of confidential communications protected by the attorney-client privilege.

II.

The government's motion presents two issues for determination by the Court: first, whether the attorney-client privilege attaches to the identity of Gordon's client; and second, whether that privilege, if it applies at all, is defeated here by the so-called crime or fraud exception. At the outset, the Court notes that the applicability of the privilege is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

It is well settled that confidential communications between attorney and client concerning legal advice sought from the attorney are privileged and protected from disclosure unless waived. *United States v. Goldfarb*, 328 F.2d 280, 281 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964). The privilege belongs to the client, not to the attorney, who cannot invoke or waive it if the client desires otherwise. *Republic Gear Co. v. Borg Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967). Its purpose is summarized in this classic statement of Dean Wigmore:

> In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent.

8 Wigmore, Evidence § 2291 (McNaughton rev. 1961).

It is equally well-established, however, that not every communication between attorney and client is protected. Among those matters generally held not to be within the scope of the privilege is the identity of the attorney's client. *In Re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 204 (5th Cir. 1981); *In Re Grand Jury Proceedings (Tinari)*, 631 F.2d 17, 19 (2d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); *In Re Grand Jury Proceedings*

(*Lawson*), 600 F.2d 215, 218 (9th Cir. 1979); *United States v. Pape*, 144 F.2d 778, 782 (2d Cir. 1944). A narrow exception has been carved out of this general rule to protect the identity of a client when disclosure "would implicate the client in the very criminal activity for which legal advice was sought." *United States v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977). *See also Tillotson v. Boughner*, 350 F.2d 663, 666 (7th Cir. 1965); *Baird v. Koerner*, 279 F.2d 625, 633 (9th Cir. 1960).

This exception is a very limited one, and whether or not it applies in any given case depends greatly upon the circumstances of that case. *Baird v. Koerner*, 279 F.2d at 631; 8 Wigmore, Evidence § 2313 (McNaughton rev. 1961). The mere possibility that the client may be implicated is not sufficient in itself to prevent disclosure of the client's identity. Rather, there must be a "strong probability" that incrimination may result from disclosure. *United States v. Hodge and Zweig*, 548 F.2d at 1353. Such a probability may exist, for example, "when so much of the substance of the communication is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions." *In Re Grand Jury Proceedings* (*Jones*), 517 F.2d 666, 674 (5th Cir. 1975). *See also In Re Grand Jury Proceedings* (*Pavlick*), 680 F.2d 1026, 1027 (5th Cir. 1982); *NLRB v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965).

The substantial burden placed upon an attorney claiming the privilege on behalf of his or her client to demonstrate a strong probability of incrimination is clearly justified when one considers the fact that the privilege, although it serves an important function in our society, is nonetheless a derogation of the search for truth, and so should not be expansively construed or broadly applied. As Dean Wigmore admonished:

> It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investiga-

> tion of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

8 Wigmore, Evidence § 2292 (McNaughton rev. 1961). This admonition is particularly appropriate in the grand jury context. Traditionally, grand juries have a broad investigative function, and courts are reluctant to hinder their pursuit of the truth with numerous preliminary showings and minitrials. *See United States v. Dionisio*, 410 U.S. 1, 17 (1973); *In re Katz*, 623 F.2d 122, 127 (2d Cir. 1980) (Lumbard, J., dissenting).

Even if the privilege is held to attach to the identity of the client, it may be defeated by the so-called crime or fraud exception. If the professional relationship is secured to further a present or future illegal activity, the privilege does not exist. This is so even if the attorney is unaware of the client's true intentions. *Clark v. United States*, 289 U.S. 1, 15 (1933) (dicta); *In Re Grand Jury Proceedings* (*Pavlick*), 680 F.2d 1026, 1027 (5th Cir. 1982); *In Re Grand Jury Proceedings* (*Fine*), 641 F.2d at 203.

Procedurally, it is the burden of the individual claiming the privilege to demonstrate that disclosure of the client's identity would probably incriminate the client. However, the party seeking disclosure first has the burden of demonstrating that a legitimate need exists for the information. *United States v. Hodge and Zweig*, 548 F.2d at 1353. When an attorney is called to testify before a grand jury on matters relating to the representation of a client, he or she may well be placed in the position of becoming a witness against that client. Particularly where the professional relationship is ongoing, compelling the attorney's testimony may threaten future frank and open communications between attorney and client. Requiring the party seeking disclosure—in this case, the government—to show a need for the informa-

tion sought avoids unnecessary invasion of the attorney-client relationship while at the same time ensuring that the grand jury will have access to the information it needs to further its investigation.

It is also the burden of the party seeking disclosure to make a showing that the professional relationship was secured in order to further a criminal activity. *United States v. Hodge and Zweig*, 548 F.2d at 1354. This burden is not satisfied by a mere charge of fraud, rather, there must be " 'something to give colour to the charge,' there must be '*prima facie* evidence that it has some foundation in fact.' " *Clark v. United States*, 289 U.S. at 15.

III.

The Court now turns to an examination of the facts presented here in light of the principles just summarized. First, Gordon contends that the government has failed to make the necessary preliminary showing of need. He argues that the Government's *in camera* material apparently shows that the grand jury already has the information it needs "for its deliberations on whether it should return a true bill." There is no real basis for this conclusion. For some time now the government has been attempting to secure information concerning the control of the corporations, but has so far been frustrated in its efforts to do so. The four questions propounded to Gordon represent one more attempt to obtain this information. The Court is of the opinion that the government has made a sufficient showing of need.[1]

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[1] Gordon suggests that the standard for this preliminary showing should be an "important need", citing *In Re Special Grand Jury (Harvey)*, 676 F.2d 1005 (4th Cir. 1982). This Court sees no need to go into the difference between "important need" and "legitimate need". The Fourth Circuit itself recognized that the requirements for the preliminary showing will vary from case to case. It required the government to address only two inquiries—whether the information sought was necessary and whether the subpoenaed attorney was the best source for the information. *Id.* at 1011 n. 6. The government here has met both requirements.

Therefore, in order for the identity of the unnamed client to be protected, there must be a strong probability that disclosure would implicate him in the very criminal activity for which legal advice was sought. Legal representation was sought for the purpose of forming certain corporations and handling their affairs. Gordon himself has made no argument that there is a "strong probability" that his client would be incriminated in a criminal activity related to the formation or operation of the corporations. Quite the contrary, after summarizing the applicable law, Gordon argues that "on the basis of the record of his appearance before the grand jury. . . [and] on the facts appearing before the Court, there is nothing to indicate that the witness' client . . . is the party who is alleged to have engaged in the criminal activity which the Government would urge to invoke the crime-fraud exception."

Gordon then refers to the affidavit submitted by intervenor John Doe, Gordon's client. The Court has examined this affidavit, and can find nothing there to suggest that the danger of incrimination is so great that the secrecy of Doe's identity should be preserved. Indeed, representations in this affidavit suggest that the opposite is true.

At this point, it is necessary to discuss in greater detail the four questions put to Gordon. The first three questions listed above relate to legal advice sought concerning the formation and operation of the corporations. The fourth question, requesting the identity of the person who removed or received custody of the records of the corporations which had been kept in the law firm's files, appears to concern a single, simple transaction unrelated to the formation or the daily operations of the corporations. It is known only that the individual who received the records was a client. No reason for the removal has been given, and there is no indication that the transaction was in any way related to legal advice or the legal representation of the corporations by Gordon's firm. Gordon's

own testimony indicates merely that a request had been made for the removal of the records, and that arrangements were made to carry out that request. Moreover, John Doe's affidavit does not demonstrate any connection between this transaction and a legal matter concerning which John Doe had sought advice on behalf of himself or the corporations.[2]

In light of these circumstances, it would be straining the attorney-client privilege to protect the identity of the person or persons referred to in the fourth question. The fact that a client may have been involved is not a sufficient reason for sustaining the privilege absent a showing that disclosure would result in the client's incrimination in a criminal activity. No such showing has been made with respect to any of the questions. Thus, as to each of them, but particularly as to the fourth, there is no reason why Gordon should not be compelled to testify.

Because Gordon and John Doe have failed to meet their burden of demonstrating a strong probability of incrimination, the general rule concerning disclosure of a client's identity applies, and there is no real need for the Court to address the crime or fraud exception. However, without deciding the issue, it would seem that the two affidavits submitted in support of the government's argument are insufficient to constitute a *prima facie* showing that the corporations were formed and used as part of a fraudulent tax evasion scheme.

The first affidavit consists primarily of the testimony of other grand jury witnesses indicating that Reuben Sturman was the individual they dealt with when the records of some of the corporations were required. In

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[2] In fact, John Doe does not even specifically assert that he is the individual referred to in the fourth question, but he does specifically indicate that he is the individual referred to in the other three questions. This demonstrates to the Court even more convincingly that the identity of the person referred to in the question concerning the documents should not be privileged.

addition, it briefly summarizes conclusions the government reached after examining apparently hundreds of official documents which allegedly reveal efforts to conceal ownership of over three hundred different corporations. None of these documents have been made available to the Court for its examination. The second affidavit contains the statements of a witness made during an interview with an FBI agent, alleging efforts on the part of Reuben Sturman and his counsel to conceal ownership of a certain corporation which is not among the twelve listed in the government's motion.

These two affidavits, which together amount to a few conclusions based upon documents not before the Court and testimony more relevant to the whereabouts of the sought-after documents than to the formation and purpose of the corporations, probably do not rise to the level of *prima facie* evidence of crime or fraud. However, regardless of how the Court would resolve the applicability of the crime or fraud exception, the claim of privilege would have to fail. Unfortunately, this case provides a rather harsh example of how rules that are designed to protect the individual may sometimes work at cross-purposes. The Fifth Circuit in *In Re Grand Jury Proceedings* (*Fine*), 641 F.2d at 204, reached this conclusion in a case presenting facts very similar to those of the instant controversy. The court in *Fine* found that the government had failed to make a *prima facie* showing of criminal or fraudulent activity in the formation of a certain company and its relationship to a ship which had been used to smuggle marijuana. The attorney of the unnamed client had testified that the professional relationship had not been formed to further a criminal enterprise but rather was intended only for the purpose of forming and maintaining the company in a legitimate manner. The Court ruled that the attorney could be compelled to testify.

> The *Baird* exception to the general rule is designed to protect the identity of clients who seek legal advice as to *past* activities that may result in criminal prosecution. If a legitimate relationship is an evidentiary lead to *subsequent, unrelated* criminal activity, no substantial interest of society is served by protecting the name of the client and fee arrangement involved in the legitimate activity. If the legal relationship is illegitimate because it is *related* to subsequent criminal activity, there is even less reason to protect the name of the client.

Id. at 204, n.5.

The Court recognized the implications of its holding:

> We acknowledge that, if the formation of Labol *was* directly related to a criminal enterprise, the unnamed client would be in a classic Catch-22: he must admit the connection of the two activities in order to make his name privileged information, but that very admission destroys the attorney-client privilege altogether.

Id. at n.6.

If the Court were to rule here that the government had succeeded in making a *prima facie* showing two contradictory conclusions would follow: first, the attorney-client privilege would attach because disclosure of the client's name would implicate the client in the criminal activity for which legal representation was sought, namely, the formation and use of these corporations for tax evasion purposes, and second, the privilege would be defeated because legal advice was sought for an intended illegal purpose.

However, the Court has already explained that the government seems to have fallen short of a *prima facie* showing of fraudulent or criminal activity. That, combined with the lack of any showing by either John Doe or Gordon of a strong probability of incrimination in a

criminal activity related to the formation or operation of the corporations, leaves no basis for the protection of the identity of the client.

The Court recognizes that the identity of John Doe is an important element in the government's investigation. On the basis of the evidence that it has before it, however, the Court cannot conclude that disclosure of the identity of John Doe would supply the government with "the last link in an existing chain of incriminating evidence likely to lead to the client's indictment." *In Re Grand Jury Proceedings* (*Pavlick*), 680 F.2d 1026, 1027 (5th Cir. 1982). That it may prove damaging to John Doe with respect to some transaction other than his seeking legal representation for the purpose of forming these corporations or handling their affairs is no ground for preserving the attorney-client privilege, for the privilege attaches only to those confidential communications concerning matters for which the legal advice was sought.

The witness, Larry S. Gordon, is hereby ordered to respond to the four questions propounded by the government.

IT IS SO ORDERED.

/s/ Frank J. Battisti
FRANK J. BATTISTI
Chief Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83-1290

IN RE GRAND JURY INVESTIGATION
No. 83-2-35

Decided and Filed December 7, 1983

On Appeal From the United States District Court for the Eastern District of Michigan

Before: ENGEL and KRUPANSKY, *Circuit Judges*, and CELEBREZZE, *Senior Circuit Judge*.

KRUPANSKY, Circuit Judge. Attorney Richard Durant (Durant) appeals a finding of contempt for failure to disclose to the grand jury upon order of court the identity of his client. On March 1, 1983, Special Agent Edwards (Edwards), of the Federal Bureau of Investigation (FBI), visited Durant's office and explained that the FBI was investigating the theft of numerous checks made payable to International Business Machines, Inc. (IBM). He advised that a number of the stolen checks had been traced and deposited into various banking accounts under names of non-existent organizations, at least one of which included the initials "IBM". Edwards produced a photostatic copy of a check drawn upon one of these ficticious accounts which check was made payable to Durant's law firm. Upon FBI inquiry, Durant

conceded that this check for $15,000 had been received and endorsed by his firm for services rendered to a client in two cases, one of which was "finished" and the other of which was "open". Durant refused to disclose the identity of his client to whose credit the proceeds had been applied, asserting the attorney-client privilege.

Durant was subpoenaed to appear before the grand jury the following day, March 2, 1983, where he again refused to identify his client, asserting the attorney-client privilege. The government immediately moved the United States District Court for the Eastern District of Michigan for an Order requiring Durant to provide the requested information. At a hearing that same afternoon, Durant informed the court that disclosure of his client's identity could incriminate that client in criminal activity so as to justify invoking the attorney-client privilege. Citing to the court: *In re Grand Jury Appearance (Michaelson)*, 511 F.2d 882 (9th Cir.), *cert. denied*, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 469 (1975); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). Durant additionally stated that "I do not know any of the facts about this theft or anything else", and suggested that the requested information should be obtained through other methods.[1] The court adjudged that the privilege did not attach and ordered Durant to identify his client. Upon refusal to comply with this Order, Durant was held in contempt. Further proceedings (e.g. bond) were

[1] Durant stated:

> I should add that if the facts as the agents have discussed them with me are correct and there is a substantial number of checks floating around the city, all those checks come back to the drawee bank with bank endorsements on the back. It should be, it seems to me, equally possible, without violating the attorney-client privilege, for the agents to find out who presented, who cashed and to trace the money through normal commercial channels, to say nothing of the fact that who opens the mail at IBM now obviously becomes of significant importance.

stayed until March 16, 1983, and subsequently stayed until March 22, 1983.

In an obvious attempt to ascertain the identity of Durant's client in an alternate manner, the United States issued a second subpoena to Durant on March 9, 1983, ordering him to appear before the grand jury on March 16, 1983, and produce the following documents:

> A listing of all clients of the law firm of Durant & Durant, P.C., and Richard Durant as of February 18, 1983 including all clients with active cases and clients who owe fees or have provided a retainer to the firm and all client ledger cards and other books, records and documents reflecting or recording payments to the law firm for the period February 1, 1983 to March 1, 1983.

Durant moved to quash this subpoena duces tecum, again asserting the attorney-client privilege. At the March 22, 1983 hearing on this motion, Durant re-asserted that production of the subpoenaed documents could implicate his client in criminal activity. He additionally observed that the FBI had admitted before Durant and the district court judge in-chambers that an arrest would be effected by the FBI immediately following disclosure.[3] In effect, the identity of Durant's client was the last link of evidence necessary to effect an indictment. The Court was advised for the first time by Durant that on March 2, 1983 the FBI requested, under threat of harassment,

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[3] Durant stated:

> I would remind the Court that when, through the courtesy of the Court, we had a session in-chambers with the members of the FBI present, as well as the U.S. Attorney and myself, the FBI members specifically said—I can't remember which one—specifically said that as soon as we get the name of that client, we are going to arrest the client * * *

The substance of this statement was never challenged either directly or indirectly by either the district court or the United States.

that Durant "breach" the attorney-client privilege and identify his client without informing the client.[5]

The Court was informed that disclosure of the requested information would not only implicate Durant's client in criminal activity, but it would implicate that client in the very criminal activity for which legal advice had been sought.

COURT: Do you contend and do you submit that the disclosure of the information which is sought by this subpoena, quote, would implicate your client in the very criminal activity for which legal advice was sought?

MR. DURANT: Yes, Your Honor, I do.

COURT: Other than—in what way do you contend that it would?

MR. DURANT: Sir, I'm in a catch-22 position again. I can't tell you. If I tell you, I have explained things that my client obviously doesn't wish to be disclosed.

COURT: All right.

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[5] Durant stated:

Furthermore—and I put this on the record after consultation with my son, who told me I should have expressed it on March 2nd. During the time the Court recessed, preparatory to rendering an opinion, this gentlemen—the FBI agent whose name escapes me for the moment—and I, the U.S. Attorney were outside, and I was given the proposition that I should tell the FBI the identity of my client, but not tell my client that I had done so, so that the FBI presumably could move in.

When I rejected what was propositioned to me that I should give the identity but delay telling my client that I had done so, so presumably the same result could occur—when I rejected that, I hope in jest, it was pointed out that I could be printed and held incommunicado for six or seven hours while the circuit was written [ridden[sic]] with me, and I implied it was a good thing that I had instructed my office that if they hadn't heard from me by 3:30, to come over here with a writ of habeas corpus. I made a phone call.

Durant failed to move the court for an *ex parte in camera* submission of evidence or testimony to establish that his client had indeed sought legal advice relating to past criminal activity involving theft of IBM checks. Nor did the district court, *sua sponte*, suggest an *ex parte in camera* submission of evidence to probe Durant's blanket statements.

The United States then introduced the check into evidence in support of the proposition that it was improbable that Durant's client had engaged Durant's services to defend against impending charges of theft. A notation on the lower left hand corner of the check stated "corporate legal services". The United States observed "That doesn't say anything about crimes committed or to be committed or legal services in connection with criminal matters. It is 'corporate legal services'; no suggestion of any criminal investigation." It was additionally noted by the government that the FBI had not initiated the investigation nor had it been informed of the theft of the IBM checks until March 1st, approximately two weeks *after* the check had been received by Durant. Durant offered the following rebuttal:

> I don't know when IBM knew it (i.e. knew that checks had been stolen), but Mr. Edwards, when he appeared at my office, told me that it did involve checks from IBM, and I said that on March 2nd, when I appeared here.
>
> I think the mere fact that the check says for "corporate legal services" when it has been admitted by the U.S. Attorney that such a corporation doesn't even exist, it is a fictional entity, doesn't deny what I am representing to the Court.

The district court, opining that the issues joined in the first and second subpoenaes served upon Durant were "essentially the same", withheld a decision of Durant's motion to quash the second subpoena duces tecum pend-

ing appellate resolution of the court's contempt Order of March 2, 1983.

Confronting the applicability of the attorney-client privilege as urged by Durant, it is initially observed that the privilege is recognized in the federal forum. *See*: *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1975); Rule 501, Federal Rules of Evidence. The burden of establishing the existence of the privilege rests with the person asserting it. *See*: *In re Walsh*, 623 F.2d 489, 493 (7th Cir.), *cert. denied*, 449 U.S. 994, 101 S.Ct. 531, 66 L.Ed.2d 291 (1980); *Liew v. Breen*, 640 F.2d 1046, 1049 (9th Cir. 1981); *United States v. Stern*, 511 F.2d 1364, 1367 (2d Cir. 1975); *United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1979); *In re Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d 469, 474 (3d Cir. 1979); *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974); *United States v. Tratner*, 511 F.2d 248, 251 (7th Cir. 1975); *United States v. Demauro*, 581 F.2d 50, 55 (2d Cir. 1978); *United States v. Ponder*, 475 F.2d 37, 39 (5th Cir. 1973); *United States v. Bartlett*, 449 F.2d 700, 703 (8th Cir. 1971), *cert. denied*, 405 U.S. 932, 92 S.Ct. 990, 30 L.Ed.2d 808 (1972). The attorney-client privilege exists

> to protect confidential communications between a lawyer and his client in matters that relate to the legal interests of society and the client.

In re Grand Jury Proceedings (Fine), 641 F.2d 199, 203 (5th Cir. 1981). *Accord*: *In re Grand Jury Subpoena (Slaughter)*, 694 F.2d 1258, 1260 (11th Cir. 1982); *United States v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); *In re Grand Jury Investigation (Tinari)*, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083, 101 S.Ct. 869-70, 66 L.Ed.2d 808 (1981). The policy behind protecting confidential communications is self-evident:

> In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure from the legal advisors must be removed; hence the law must prohibit such disclosure except on the client's consent.

Hodge & Zweig, supra, 548 F.2d at 1353, citing 8 J. Wigmore, *Evidence*, § 2291 at 545 (McNaughton Rev. Ed. 1961). *Accord Fisher, supra*, 425 U.S. at 403, 96 S.Ct. at 1577 ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys").* *See also*: *United States v. Goldfarb*, 328 F.2d 280 (6th Cir.) *cert. denied*, 377 U.S. 976, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964).

Since the attorney-client privilege may serve as a mechanism to frustrate the investigative or fact-finding process, it creates an inherent tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process. *See*: *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 671-72, (5th Cir. 1975) ("the purpose of the privilege—to suppress truth—runs counter to the dominant aims of law"). In particular, invocation of the privilege before the grand jury may jeopardize an effective and comprehensive investigation into alleged violations of the law, and thereby thwart that body's dual functions of determining "if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686-87, 92 S.Ct. 2646, 2659, 33 L.Ed. 2d

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* The Court additionally noted

> As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully refined legal advice.

425 U.S. at 403, 96 S.Ct. at 1577.

626 (1972).[7] These competing societal interests demand that application of the privilege not exceed that which is necessary to effect the policy considerations underlying the privilege, i.e., "the privilege must be upheld only in those circumstances for which it was created." *In re Walsh*, *supra*, 623 F.2d at 492. *Accord*: *Fisher*, *supra*, 425 U.S. at 403, 96 S.Ct. at 1577 ("it applies only where necessary to achieve its purpose.") As a derogation of the search for truth, the privilege is to be narrowly construed. *See*: *United States v. Weger*, 709 F.2d 1151, 1154 (7th Cir. 1983); *Baird v. Koerner*, 279 F.2d 623, 631-32 (9th Cir. 1960); *United States v. Pipkins*, 528 F.2d 559, 562-63 (5th Cir. 1976).

The federal forum is unanimously in accord with the general rule that the identity of a client is, with limited exceptions, not within the protective ambit of the attorney-client privilege. *See*: *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc); *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 670-71 (5th Cir. 1975); *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 204 (5th Cir. 1981); *Frank v. Tomlinson*, 351 F.2d 384 (5th Cir. 1965), *cert. denied*, 382 U.S. 1028, 86 S.Ct. 648, 15 L.Ed.2d 540 (1966); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 361 (9th Cir. 1982); *In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach)*, 695 F.2d 363, 365 (9th Cir. 1982); *In re Grand Jury Proceedings (Lawson)*, 600 F.2d 215, 218 (9th Cir. 1979).[8]

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[7] It is fundamental, however, that although the subpoena powers of the grand jury are extremely broad, it may not use its authority to "violate a valid privilege, whether established by the Constitution, statutes, or the common law." *United States v. Calandra*, 414 U.S. 338, 346, 94 S.Ct. 613, 619, 38 L.Ed.2d 561 (1974).

[8] This general rule applies equally to fee arrangements:

> In the absence of special circumstances, the amount of money paid or owed to an attorney by his client is generally not within the attorney-client privilege. *In re Michaelson*, 511 F.2d 882, 888 (9th Cir.) *cert. denied*, 421 U.S. 978, 95 S.Ct. 1979, 44

The Circuits have embraced various "exceptions" to the general rule that the identity of a client is not within the protective ambit of the attorney-client privilege. All such exceptions appear to be firmly grounded in the Ninth Circuit's seminal decision in *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). In *Baird* the IRS received a letter from an attorney stating that an enclosed check in the amount of $12,706 was being tendered for additional amounts due from undisclosed taxpayers. When the IRS summoned the attorney to ascertain the identity of the delinquent taxpayers the attorney refused identification asserting the attorney-client privilege. The Ninth Circuit, applying California law, adjudged that the "exception" to the general rule as pronounced in *Ex Parte McDonough*, 170 Cal. 230, 149 P. 566 (1915) controlled:

> The name of the client will be considered privileged matter where the circumstances of the case are such that the name of the client is material only for the purpose of showing an acknowledgement of guilt on the part of such client of the very offenses on account of which the attorney was employed.

Baird, supra, 279 F.2d at 633. The identity of the *Baird* taxpayer was adjudged within this exception to the general rule. The Ninth Circuit has continued to acknowledge this exception:

L.Ed.2d 469 (1975); *see In re Grand Jury Proceedings*, 517 F.2d 666, 670-71 (5th Cir. 1975). The receipt of fees from a client is not usually within the privilege because the payment of a fee is not normally a matter of confidence or a communication. *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974). This Court has held that ministerial or clerical services of an attorney in transferring funds to or from a client is not a matter of confidence protected by the attorney-client privilege. *United States v. Bartone*, 400 F.2d 459 (6 Cir. 1968), *cert. denied*, 393 U.S. 1027, 89 S.Ct. 631, 21 L.Ed.2d 571 (1969).

United States v. Haddad, 527 F.2d 537, 538-39 (6th Cir. 1975).

> A significant exception to this principle of non-confidentiality holds that such information may be privileged when the person invoking the privilege is able to show that a strong possibility exists that disclosure of the information would implicate the client in the very matter for which legal advice was sought in the first case.

In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach), 695 F.2d 363, 365 (9th Cir. 1982). *Accord*: *United States v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); *In re Grand Jury Proceedings (Lawson)*, 600 F.2d 215, 218 (9th Cir. 1979); *United States v. Sherman*, 627 F.2d 189, 190-91 (9th Cir. 1980); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 361 (9th Cir. 1982). This exception, which can perhaps be most succinctly characterized as the "legal advice" exception, has also been recognized by other circuits. *See*: *In re Walsh*, 623 F.2d 489, 495 (7th Cir.), *cert. denied*, 449 U.S. 994, 101 S.Ct. 531, 66 L.Ed.2d 291 (1980); *In re Grand Jury Investigation (Tinari)*, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083, 101 S.Ct. 869-70, 66 L.Ed.2d 808 (1981). Since the legal advice exception is firmly grounded in the policy of protecting confidential communications, this Court adopts and applies its principles herein. *See*: *In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach)*, *supra*.

It should be observed, however, that the legal advice exception may be defeated through a *prima facie* showing that the legal representation was secured in furtherance of present or intended continuing illegality, as where the legal representation itself is part of a larger conspiracy. *See*: *In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach)*, *supra*, 695 F.2d at 365 n.1; *In re Walsh*, 623 F.2d 489, 495 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980); *In re Grand Jury Investigation (Tinari)*, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); *In re Grand Jury Proceedings (Lawson)*, 600

F.2d 215, 218 (9th Cir. 1979); *United States v. Friedman*, 445 F.2d 1076, 1086 (9th Cir. 1971). *See also*: *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 469, 77 L.Ed. 993 (1933); *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1028-29 (5th Cir. 1982) (en banc).

Another exception to the general rule that the identity of a client is not privileged arises where disclosure of the identity would be tantamount to disclosing an otherwise protected confidential communication. In *Baird*, *supra*, the Ninth Circuit observed:

> If the identification of the client conveys information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client, then the privilege should extend to such identification in the absence of other factors.

Id., 279 F.2d at 632. Citing *Baird*, the Fourth Circuit promulgated the following exception:

> To the general rule is an exception, firmly bedded as the rule itself. The privilege may be recognized where so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.

NLRB v. Harvey, 349 F.2d 900, 905 (4th Cir. 1965). *Accord*: *United States v. Tratner*, 511 F.2d 248, 252 (7th Cir. 1975); *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963); *Tillotson v. Boughner*, 350 F.2d 663, 666 (7th Cir. 1965); *United States* v. *Pape*, 144 F.2d 778, 783 (2d Cir. 1944). *See also*: *Chirac v. Reinecker*, 24 U.S. (11 Wheat) 280, 6 L.Ed. 474 (1826). The Seventh Circuit has added to the *Harvey* exception the following emphasized caveat:

> The privilege may be recognized where so much of the actual communication has already been disclosed

> [*not necessarily by the attorney, but by independent sources as well*] that identification of the client [*or of fees paid*] amounts to disclosure of a confidential communication.

United States v. Jeffers, 532 F.2d 1101, 1115 (7th Cir. 1976) (emphasis added). The Third Circuit, applying this exception, has emphasized that it is the link between the client and the *communication*, rather than the link between the client and the possibility of potential criminal *prosecution*, which serves to bring the client's identity within the protective ambit of the attorney-client privilege. *See*: *In re Grand Jury Empanelled February 14, 1978* (*Markowitz*), 603 F.2d 469, 473 note 4 (3d Cir. 1979). Like the "legal advice" exception, this exception is also firmly rooted in principles of confidentiality.

Another exception, articulated in the Fifth Circuit's *en banc* decision of *In re Grand Jury Proceedings* (*Pavlick*), 680 F.2d 1026 (5th Cir. 1982) (*en banc*),* is recognized when disclosure of the identity of the client would provide the "last link" of evidence:

> We have long recognized the general rule that matters involving the payment of fees and the identity of clients are not generally privileged. *In re Grand Jury Proceedings*, (*United States v. Jones*), 517 F.2d 666 (5th Cir. 1975); *see* cases collected *id.* at 670 n.2. There we also recognized, however, a limited and narrow exception to the general rule, one that obtains when the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment.

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* It appears that *Pavlick sub silentio* overruled *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199 (5th Cir. 1981), wherein a panel of the Fifth Circuit applied the "legal advice" exception rather than a "last link" exception.

Id. at 1027.[10] Upon careful consideration this Court concludes that, although language exists in *Baird* to support viability of *Pavlick's* "last link" exception,[11] the exception is simply not grounded upon the preservation of confidential *communications* and hence not justifiable to support the attorney-client privilege. Although the last link exception may promote concepts of fundamental fairness against self-incrimination, these concepts are not proper considerations to invoke the attorney-client privilege. Rather, the focus of the inquiry is whether disclosure of the identity would adversely implicate the confidentiality of communications. Accordingly, this Court rejects the last link exception as articulated in *Pavlick*.

Turning to the facts at bar, it is observed that Durant asserted three justifications for invocation of the attorney-client privilege. First, at the March 2 hearing, he stated that disclosure might possibly implicate the client in criminal activity. As this justification has no roots in concepts of confidentiality or communication, it cannot be advanced to support an abdication of the general rule that

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[10] The Eleventh Circuit has adopted the "last link" exception as pronounced in *Pavlick*. *See: In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351, 1352-3 (11th Cir. 1982); *In re Grand Jury Subpoena (Slaughter)*, 694 F.2d 1258, 1260 (11th Cir. 1982). *See also: In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975), adopted by the Eleventh Circuit as precedent in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). Compare, however, *In re Grand Jury Proceedings, (Freeman)*, 708 F.2d 1571, 1573-74 (11th Cir. 1983), affirming a contempt order issued by a district court which applied the "legal advice" rather than "last link" exception.

[11] Although *Baird* observed in passing that disclosure of the identity of the clients "may well be the link that could form the chain of testimony necessary to convict [the taxpayers] of a federal crime", 279 F.2d at 632, the Court repeatedly emphasized that the retention of the attorney and remission of a check to the IRS was tantamount to a communication or admission from the clients to the attorney that "they had not paid a sufficient amount in income taxes some one or more years in the past". *Id.*

identity of a client is not privileged. Second, at the March 22 hearing, Durant informed the Court that the FBI had informed him that an arrest would be effected upon disclosure of the identity of Durant's client. This is simply an assertion that disclosure would provide the last link of evidence to support an indictment as articulated in *Pavlick*—a precedent which is herein rejected.

Third, at the March 22 hearing, Durant submitted that disclosure was justified under the "legal advice" exception embraced by the Ninth Circuit. Seeking to invoke this exception, it was incumbent upon Durant to "show that a *strong possibility* exist[ed] that disclosure of the information would implicate the client in the very matter for which legal advice [had been] sought in the first case." *In re Grand Jury Subpoenas Duces Tecum* (*Marger/Merenbach*), *supra*, 695 F.2d at 365 (emphasis added). A well recognized means for an attorney to *demonstrate* the existence of an exception to the general rule, while simultaneously preserving confidentiality of the identity of his client, is to move the court for an *in camera ex parte* hearing. *See*: *In re Grand Jury Witness* (*Salas*), *supra*, 695 F.2d at 362; (proper procedure to establish existence of "legal advice" exception was to make an *in camera* showing); *In re Grand Jury Empanelled February 14, 1978* (*Markowitz*), *supra*, 603 F.2d at 474 (referring to procedure to be employed by an attorney who asserts Fifth Amendment privilege); *In re Grand Jury Subpoena* (*Slaughter*), *supra*, 694 F.2d at 1260 n.2 (United States requested in its subpoena that any averred privileged matters be deleted and the original copy retained intact for possible *in camera* inspection by the district court); *In re Walsh*, *supra*, 623 F.2d at 494 n.5; *United States v. Trattner*, *supra*, 511 F.2d at 252.

Since the burden of establishing the existence of the privilege rests with the party asserting the privilege, it is incumbent upon the attorney to move for an *in camera ex parte* hearing if one is desired. In the action *sub*

judice, Durant failed to so move. Rather, he rested on his blanket assertion that his client had initially sought legal advice relating to matters involving the theft of IBM checks. Such unsupported assertions of privilege are strongly disfavored. *See*: *United States v. Cromer*, 483 F.2d 99, 102 (9th Cir. 1973); *United States v. Davis*, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981); *In re Grand Jury Witness (Salas)*, *supra*, 695 F.2d at 362. Further, it is pertinent to observe that at the first hearing on March 2 Durant had expressly disavowed knowledge of the existence of stolen IBM checks. This statement significantly diminishes the credibility of Durant's subsequent March 22 representation that his client had indeed engaged Durant's services for past activity relating to stolen FBI checks. Accordingly, Durant clearly failed to satisfy his burden of demonstrating a "strong possibility" that disclosure of the identity of his client would implicate that client in the very manner for which legal advice had been initially sought.

Last, it is observed that Durant did not represent to the district court that disclosure of the identity of his client would amount to a disclosure of a confidential communication. *See*: *NLRB v. Harvey*, *supra*; *United States v. Jeffers*, *supra*. Not having advanced this exception to the general rule, it follows axiomatically that Durant failed to satisfy the burden of establishing its existence. Nor does the record suggest the viability of this exception so as to justify a remand.

In sum, Durant has failed to establish the existence of any exception to the general rule that disclosure of the identity of a client is not within the protective ambit of the attorney-client privilege. Therefore the contempt Order of the district court issued against Durant is hereby **AFFIRMED**.